In the matter of Arbitration between the American Federation of Government Employees, Local 801, Federal Correction Institution, Waseca, Minnesota and Federal Bureau of Prisons, Federal Correction Institution, Waseca, Minnesota.

OPINION AND AWARD

FMCS Case No. 06-57219

GRIEVANCE ARBITRATION

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of AFGE, Local 801
Christopher P. Campbell, Executive Vice President
Richard A. Lammi, Second Vice President
Waseca, Minnesota

On behalf of The Federal of Bureau of Prisons
Natalie R.W. Holick, Assistant General Counsel
Office of General Counsel
United States Department of Justice
Federal Bureau of Prisons
Kansas City, KS

JURISDICTION

In accordance with the Master Agreement between Federal Bureau of Prisons and Counsel of Prison Locals, American Federation of Government Employees; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, D.C., the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on August 21, 2007 and September 21, 2007 at the Waseca County Highway Department, Waseca, Minnesota. Post-Hearing briefs were filed by the parties on October 26, 2007 and received by the arbitrator on October 29, 2007. The decision was rendered by the arbitrator on November 26, 2007.

ISSUES AT IMPASSE

The Union states the issues as:

1. Is the matter arbitrable?

2. Did the agency violate the Master Agreement or federal law by unilaterally ending negotiations regarding personal protective equipment or by their subsequent actions? [Post-Hearing Briefs of Union at 1-2].

The Federal Bureau of Prisons states the issues as:

1. Was the grievance in this matter untimely filed?

2. Did the Union fail to supervise violation of the statute or contract by management officials? [Post-Hearing Brief of Federal Bureau of Prisons at 1].

The pertinent Collective Bargaining Agreement provisions are:

ARTICLE 3 – GOVERNING REGULATIONS

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.

1. local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section a. Each employee shall have the right to form, join, or assist a labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided by 5 USC, such right includes the right:

1. to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of government, the Congress, or other appropriate authorities; and

2. to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees in accordance with 5 USC.

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

1. to bring any matters of personal concern to the attention of any Management official, any other officials of the executive branch of government, the Congress, and any other authorities. The parties endorse the concept that matters of personal concern should be addressed at the lowest possible level; however, this does not preclude the employee from exercising the above-stated rights;

2. to be treated fairly and equitably in all aspects of personnel management;

3. to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership, or Union activity;

4. to direct and pursue their private lives without interference by the Employer or the Union, except in situations where there is a nexus between the employee's conduct and their position. This does not preclude a representative of the Employer or the Union from contacting bargaining unit staff for legitimate work-related matters;

5. to become or remain a member of a labor organization; and

6. to have all provisions of the Collective Bargaining Agreement adhered to.

ARTICLE 27 – HEALTH AND SAFETY

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and

2. the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.

Section b. The parties agree that participation in and monitoring of safety programs by the Union is essential to the success of these programs. The Union recognizes that the Employer employs Safety and Health Specialists whose primary function is to oversee the safety and health programs at each institution.

1. it is understood by the parties that the Employer has the responsibility for providing information and training on health and safety issues. The Union at the appropriate level will have the opportunity to provide input into any safety programs or policy development; and

2. although the Employer employs Health and Safety Specialists whose primary function is to oversee the health and safety programs at each facility, representatives of the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), Centers for Disease Control (CDC), and other regulatory and enforcement agencies that have a primary function of administering the laws, rules, regulations, codes, standards, and executive orders related to health and safety matters are the recognized authorities when issues involving health and safety are raised.

ARTICLE 28 – UNIFORM CLOTHING

Section a. For uniformed employees, adequate foul weather gear and/or clothing will be provided and worn if the employee is required to work an outside assignment or post in inclement weather. This foul weather gear will be issued to employees for the duration of the assignment to the outside post or for the duration of the foul weather season, whichever is more practical, and will then be returned to the Employer to be cleaned, if necessary, prior to reassurance. (Duration of assignment means: the employee's quarterly, weekly, or daily assignment.) The type of foul weather gear and/or clothing may be negotiated locally.

1. uniformed employees who are not assigned to an outside post but who occasionally are assigned outside in inclement weather in the performance of their duties, and for which no Employer-owned foul weather gear is available for issuance, may wear their personal foul weather clothing provided it complies with the provisions of Article 6, Section e., is distinguishable from that issued to inmates, and is in compliance with the policy on employee uniforms and allowances [except as modified in Section a(3), below];

2. non-uniformed employees assigned on a temporary or emergency basis to a post that is outside or when the weather is inclement may wear their personal foul weather clothing provided it complies with provisions of Article 6, Section e., is distinguishable from that issued to inmates, and no adequate Employer-owned foul weather gear is available for issuance; and

3. the wearing of personal foul weather clothing sold by Bureau of Prisons related organizations is at the discretion of the Chief Executive Officer. All employee organizations, including the Union, will be treated the same in this regard. Furthermore, any such items may display no more than the employee's name, name/logo of the organization, identifies the Bureau of Prisons, and/or the official name of the institution.

Section b. The Employer will ensure that adequate supplies of security and safety equipment are available for issue to and/or use by employees during the routine performance of their duties. This includes, but is not limited to, whistles, key chains, key clips, belts for equipment, disposable resuscitation masks and rubber gloves, handcuffs, two-way radios, body alarms, flashlights, hand-held metal detectors, weapons, ammunition, etc. Cases or holders, whichever is appropriate, to carry such equipment will also be available for these particular items of equipment normally using such cases or

holders. Employees receiving such items will be accountable for them until they are returned to the Employer.

Section c. The Employer will provide additional equipment or clothing for safety and health reasons when necessary due to the nature of the assignment and as prescribed by the Safety Officer. The Safety Officer will consider input from the safety committee as appropriate. This equipment or clothing will be in a size identified by the employee and will not be charged to the employee's uniform allowance.

Section d. On armed posts, if the wearing of a bullet-proof vest is mandated or requested, there will be a sufficient supply of such vests provided by the Employer. The Employer will ensure that adequate numbers and sizes of such vests are available, including vests sized for female employees. The cleaning of these vests may be negotiated locally.

Section e. If any equipment issued to an employee becomes unserviceable, it is his/her responsibility to inform the Employer so that the item can be repaired or replaced, as appropriate.

Section f. The Employer will pay an allowance each year to each employee who is required by policy to wear a uniform in the performance of their official duties. The allowance for each prescribed uniform will be no less than $400.00 per year, per uniformed employee.

1. employees who are entitled to a uniform allowance will be paid the allowance each year, which will be provided to the employee on or before the anniversary of his/her entry on duty with the Bureau of Prisons;

2. new employees covered by this section will be issued an allowance within the first week or employment; and

3. employees who transfer or are reassigned from a non-uniformed position to a uniformed position to a uniformed position will receive an allowance, in the full amount, within the first week or assuming uniformed duties.

Section g. Safety-toed footwear for uniformed and non-uniformed employees (when such employees work in a designated foot hazard area) will be shoes or boots at the discretion of the individual employee. The cost and quality of said footwear will be negotiated locally.

1. safety shoes will be worn by all employees who work in areas designated as foot hazard areas by the Institution Supplement; and

2. each eligible employee is entitled to two (2) pairs of shoes and/or boots on initial issue and one (1) pair every nine (9) months thereafter.

Section h. Uniforms for all staff will be in accordance with policy, and only those staff occupying positions outlined in policy will be eligible for a uniform allowance. Policy will not be changed or implemented until negotiated with the Union.

Section i. Any additional uniform items, when appropriate for health and safety reasons, will be negotiated at the local level.

1. the dress uniform will be worn on specified posts agreed to by the parties at the local level. On all other uniformed posts, ties will be worn with the long-sleeved shirt, sweater, or blazer. Employees will have the option of wearing a tie when wearing the short-sleeved shirt; and

2. for posts where the uniform/personal clothing may become excessively soiled, additional uniform/clothing items may be negotiated at the local level. [Joint Exhibit No. 1]

ARTICLE 31 – GRIEVANCE PROCEDURE

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence….

The pertinent institutional supplement relating to "Personal Protective Equipment", issued by the

United States Department of Justice, Federal Prison System, WAF-1600.5 is:

Number: WAS-1600.5d
Date :
Subject : PERSONAL PROTECTIVE EQUIPMENT

Institution Supplement

1. PURPOSE: To establish guidelines, based on the Occupational Health and Safety Act (OSHA) of 1970, for the provision of personal protective equipment, and to list the work areas and conditions in which it is mandatory for employees and inmates to wear protective equipment.

2. PROGRAM OBJECTIVES: To prevent injuries to staff and inmates wherever possible. Records indicate that many job-related injuries that occur each year could have been prevented by the appropriate use of personal protective equipment. These include: eye and face protection, safety shoes, hard hats, and hearing protection.

3. DIRECTIVES AFFECTED:

a) Referenced: Bureau of Prisons Program Statement 1600.8, Occupational Safety and Environmental Health Manual;, dated August 16, 1999; Occupational Health and Safety Act (OSHA), dated 1970, revised 07-01-1996, 29 CFR, Part 1910, Sub-part 1; 1910.132, Personal Protective Equipment, and OSHA, Personal Protective Equipment Final Rule, dated 07-01-1996, is referenced.

b) Rescinded; Institutional Supplement, WAS-1600, Personal Protective Equipment, dated September 25, 2002.

4. **ACTION**: Personal protective equipment and mandatory use conditions:

a) Enforcement Responsibility It is the responsibility of each Department Head to ensure employees assigned to their respective departments wear personal protective equipment when needed. Each work detail supervisor will be responsible for ensuring all inmates working in their areas of responsibility have access to and make use of appropriate personal protective equipment.

b) Types of Personal Protective Equipment and Details/Areas Where Personal Protective Equipment is Required:

(1) Head Protection: Hard hats and other associated headgear will be worn by employees and inmate workers on details where there is a possibility of falling and/or flying objects, minimal overhead spaces, overhead pipes, or any other associated hazards. In addition, inmates with long hair capable of becoming entangled in rotating, moving equipment must wear hair restraints.

(2) Hearing Protection: Protection against noise-induced hearing impairment will be provided for all employees and inmates in those areas designated by the Safety Manager as a "high Noise Level Area". Additionally, any area where a hearing hazard exists, such as the firing range, will also have hearing protection furnished. A Noise Level Survey is conducted on an annual basis by the Safety Department to determine what areas require hearing protection. These areas are then posted as requiring hearing protection. Hearing protection devices available include ear plugs, muffs, or similar protective devices. Radio headphones will not be utilized as a substitute for other forms of hearing protection. In addition, the wearing of headphones on the work site can create several hazards by not allowing the wearer to hear normal conversation and workplace situations. Therefore, the use of headphones at the work site is **prohibited**.

(3) Eye and Face Protection: Approved eye and face protection, such as safety glasses, goggles, face shields, welding helmets, etc. will be provided and worn by employees and inmate workers when performing or working in the immediate vicinity of any of the following activities:

a) Chipping metal, masonry, or glass surfaces; operating a lathe (wood or metal), drill press, or similar power equipment; using hand tools such as chisels or star drills; operating jackhammers, masonry drills, sledge hammers, or similar tools.

b) Scaling and/or grinding, filing or buffing of metal or masonry; woodworking; or any other activity where a hazard from dust or small flying particles may exist.

c) Handling or mixing hazardous chemicals (chemically approved goggles must be utilized).

d) All brazing, welding, and soldering operations and activities.

e) Landscape operations and activities involving push-type and hand-held power equipment, such as lawn edgers, weed eaters, etc.

f) All employees will wear eye protection devices while using firearms during training.

(4) Respiratory Protective Equipment: Respirators or protective face masks will be provided and worn in all work areas where the air is contaminated with harmful dust, chemical fumes, vapors or gases, potentially harmful smoke or other regulated substances. Work details and areas involving paint spraying, sand blasting, and similar power equipment will also require respirator protective equipment. Specific procedures for respirator use are spelled out in Institution Supplement, WAS-1620.3, Respirator Program.

(5) Protective Clothing: Appropriate protective clothing will be provided and must be worn by staff and inmates on work details and in area where there is a danger of exposure to any hazardous condition such as corrosive or toxic chemicals, or similar safety-type hazards. Generally, the protective clothing required will include appropriate gloves, protective aprons, boots, and coveralls.

(6) Electrical Protective Devices: Electrical safety equipment to protect against electrical shock from energized or high voltage electrical equipment will be utilized. Specifically manufactured and tested rubber or similarly insulated equipment and protective devices must be used. These include, but are not limited to, insulated hard hats, lineman's rubber gloves, insulated hoods, Ground Fault Circuit Interrupters, non-conductive safety shoes, and live line tools. Such equipment and protective devices will be provided and must be used by all employees and inmate workers whenever and wherever electrical safety hazards may be present. Testing of this equipment will be in accordance with Program Statement 1600.8, Occupational Safety and Environmental Health Manual, dated August 16, 1999. In addition, LKockout/Tagout equipment and procedures listed in Institution Supplement, WAS-1600.6, LKockout/Tagout Procedures, will be utilized.

(7) Protective Footwear: Inmates who are unable to wear safety shoes for medical reasons, as determined by institution medical staff, cannot work in areas that are designated as requiring protective footwear.

The following inmate work details and areas have been designated as requiring protective footwear:

a) All Facility Shops and/or Details.

b) Institutional Warehouse/Laundry/Commissary.

c) Food Service Kitchen and Warehouse.

d) Safety Warehouse and Recycling Detail.

e) UNICOR Warehouse and UNICOR Factor Area

f) Recreation Yard Crew - using powered equipment.

g) Yard 1 Detail – using powered equipment.

h) Horticulture Detail – using powered equipment.

i) V.T. Woodworking

j) High top (9 inches recommended) protective footwear will be worn by staff and inmate workers on details requiring any welding, cutting, and brazing operations.

(8) Exceptions: There are work areas where safety shoes are not required. This will permit inmates who are unable to wear safety shoes, because of medical reasons, to be assigned to the following areas:

a) Housing Units/Dorms.

b) Health Services Orderlies.

c) Administration and I.S.M. Orderlies.

d) Education Department/Recreation Building Orderlies.

e) Food Service Dining Room.

f) Religious Services Orderlies.

g) Custodial Orderlies – Captain's Complex, Front Lobby, Visiting Room and Center Hall Orderlies.

h) Horticulture Program.

i) Psychology/RDAP Orderlies.

Despite the non-safety shoe requirement, supervisors shall insist safety shoes be worn if the job (such as moving heavy equipment furniture, or material; calls for such to ensure the workers' protection.

(9) Employee Requirements: All Facilities shops, Food Service, Warehouse, Commissary, Laundry, Recreation, Receiving and Discharge, VT Woodshop UNICOR Warehouse and UNICOR Factory Staff are required to wear safety shoes. In addition, the Rear Gate, Armory/Lockshop, and Tool Room have also been identified as safety shoe areas. Staff will not be temporarily assigned to a safety shoe area unless they have been issued approved safety shoes. Standard safety shoes will be provided by the institution. Any questions in this area may be referred to the institution Safety Manager. Facilities Staff and Security Officer's will be required to wear electrical hazard protective footwear.

(10) Responsibility: It is the detail supervisor's responsibility to ensure that each inmate on his/her detail is properly attired in safety shoes and other protective equipment as the situation requires. It is the responsibility of the Department Head to ensure compliance by their respective employees.

(11) Universal Precaution Protection: Items such as, but not limited to, gowns, masks, gloves, and goggles are provided and to be used when dealing with body fluids.

(12) Seat Belts: Institution staff and inmate drivers shall wear a seat belt whenever driving or occupying any seat in a vehicle while on official Bureau business.

5. RESPONSIBILITIES: It is impractical to list all working conditions and circumstances where personal protective equipment should be used and worn. The areas listed in this Institution Supplement include only the more obvious of such conditions and c circumstances. It must be emphasized that respective Department Heads and individual work detail supervisors are expected to exercise good judgment and sound job planning to ensure appropriate personal protective equipment is available and is used or worn whenever and wherever conditions warrant the use of such equipment. Any questions or concerns in this area should be referred to the Safety Manager.

6. OFFICE OF PRIMARY RESPONSIBILITY: Safety.

[Agency Exhibit No. 7, emphasis in original].

The Pertinent Federal Statute is:

5 U.S.C., Sec. 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency –

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

FINDINGS OF FACT

1. On May 5, 2006, William Joenks, Jr., President of AFGE, Local 801, faxed and sent by US Post a "Formal Grievance Form" to the Federal Bureau of Prisons in Kansas City, Kansas, stating that the Federal Prison System violated "5 U.S.C. 7102 (2), 5 U.S.C. 7116 (a) (1), (5), MASTER AGREEMENT, ARTICLE 3, MASTER AGREMENT, ARTICLE 6, SECTION B and SECTION B (6). MASTER AGREEMENT, ARTICLE 7, SECTION B. MASTER AGREEMENT, ARTICLE 28, SECTION G and SECTION I." [Union Exhibit No. 3, emphasis in original].

The requested remedy sought by the Union was:

(1) The Arbitrator order the agency to enter into a binding agreement that the agency will provide Oakley Eye Protection, Stab resistant vest and safety shoes/boots for all staff until both parties agree that it would stop. (2) The arbitrator orders the agency to issue quality Oakley eye protection, stab resistant vest to be worn under the uniform and safety shoes/boots to all staff. The quality of the shoes/boots has already been negotiated by the parties. (3) Anything else deemed appropriate by the Arbitrator to make the bargaining unit members whole.
[Id.].

The Union describes, specifically, the violation by stating:

At the direction of C. Holinka, Warden, on March 29, 2006, Associate Warden D. Dubbs, ended negotiations of Institution Supplement WAS-1600.5c. Specifically on Safety Glasses, Safety Footwear, Bullet Resistant and Stab Resistant vests, by stating that the agency had "No duty to Bargain." After Management made its statement of "No duty to bargain" on the issue of protective vests, management and the union continued discussion on the issue and reached agreement on a procedure over the carriers

for the vests. Later management maintained that its previous statement on "no duty to bargain" still applied to the stab resistant vests.

Unilaterally ending negotiations on issues which affect conditions of employment constitutes a refusal to consult or negotiate in good faith. This refusal denies the bargaining unit employees and theirs the representatives the ability to exercise the right to negotiate conditions of employment which is guaranteed under 5 U.S.C. 7116 (a)(1), (5), 5 U.S.C. 7102 (2), and Article 6, section (b) of the Master Agreement. Additionally, ending the negotiations in a unilateral manner denied the union the opportunity to negotiate the procedures which management will observe in exercising it's authority in accordance with a federal labor management statute, which is a violation of ?Article 7 section (b) of the Master Agreement.

Article 27 of the Master Agreement requires the agency to provide a work place free from industrial hazards, and reduce the risks inherent in a correctional setting to the lowest possible level. Refusals to negotiate a procedure which would allow staff to have safety equipment appropriate to the situation is a violation of this article.

Article 28 section b. of the Master Agreement requires the agency to ensure adequate supply of security and safety equipment are available for issue to and/or use by employees during the routine performance of their duties. This article places no limit on the specific equipment to be kept available, in fact section c requires the agency to provide additional equipment for safety reasons or health reasons in a size identified by the employee and not to be charged against the employee's uniform allowance. Section I requires additional uniform items to be negotiated at the local level.

Article 6 section b.(2) states that all staff has a right to be treated fairly and equitably, providing some staff with a higher standard of safety equipment and denying that standard to others is a violation of this article. The agency has provided higher quality safety glasses to firearms instructors while denying those glasses to other employee's. The agency has provided stab resistant vests to some staff in the Bureau of Prisons while denying them to others. Certain staff has been provided safety shoes while other staff is required to work in positions which require the use of safety shoes while no procedure exists to provide them with foot protection. The agency's response to the discrepancy in quality of safety glasses provided to staff was to retaliate by depriving the Firearms instructors of the safety glasses the agency had found it necessary to provide in the first place. Article 6 section b. of the Master Agreement states that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations.

[Id.]

2. The Union faxed the above "Formal Grievance Form" showing a "Transmission Verification Report to the 'NCR'" report at 01:07 a.m. on May 5, 2006. [Union Exhibit No. 3]. The Union also sent the "Formal Grievance Form" by United States Postal Service, Return Receipt No. 7005 1160 0004 2631 0532, at 5 p.m. on May 5, 2006. [Union Exhibit No. 3]. The Federal Bureau of Prisons

received the United States Postal Service delivered letter at 11:29 a.m. on May 8, 2006 in Kansas City, Kansas. The Agency does not have a record of receiving the Fax.

3. On March 20, 2006, the parties began negotiations for a new Collective Bargaining Agreement. William Jenks, President of the Union and one of the Union negotiators, testified that the Union intent was "to negotiate equitable means of staff to acquire personal protective equipment to fulfill their duties". [Tr. at 337].

On March 21, 2006, Associate Warden Dwayne Dubbs issued a memorandum to the Union's chief negotiator, Mr. Christopher Campbell, informing him that, effective immediately, firearms instructors will no longer be issued Oakley brand eye protection. Rather, all staff will be provided OSHA eye protection. [Union Exhibit No. 8].

On March 22, 2006, Mr. Douglas issued a second memorandum to Mr. Campbell informing him that management had no duty to bargain Union's proposed changes to Paragraph 4b, (7), (8), (9), and (10) of Institution Supplement WAS1600.5, which included the Union's proposed employee protective footwear [Agency Exhibit No 1].

On March 24, 2006, Mr. Douglas issued a third memorandum to Mr. Campbell stating that management had no duty to bargain the Union's proposed language concerning "Body Armor" (the Union's proposal stated that employees would be provided with bullet resistant vests). Mr. Douglas noted that management is only obligated to negotiate the cleaning of vests, which was previously negotiated in Local Supplement, Article 28. [Agency Exhibit No. 3].

4. During the course of negotiations, the parties discussed the need for additional carriers for the vests that are already provided for the armed posts. [Tr. at 362]. Management proposed the purchase of five additional vest carriers to be used by officers assigned to the perimeter patrol and the Union accepted this proposal by signing a Memorandum of Understanding. [Tr. at 362].

Management took into account the Union's concern that safety glasses were needed for perimeter patrol posts. [Tr. at 362]. Based on this discussion, management decided to place one pair of safety goggles in each of the patrol vehicles during patrol shifts. [Tr. at 365-66].

Mr. Douglas testified that, on March 29, 2006, after eight days of negotiations, management ended negotiations because the parties had reviewed all of the Union's proposals and management determined that the only remaining issues were those that management did not have a duty to bargain. [Tr. 44-47, 368].

By memorandum dated March 29, 2006, Associate Warden Dubbs informed the Union:

SUBJECT: Response to Allegation of Non-Negotiability
March 29, 2006

The agency has received your March 29, 2006, request for further clarification of the agency's determination that we have no duty to bargain. The Safety Officer of FCI Waseca has determined the hazardous areas as identified in Institution Supplement WAS-1600.5c Personnel Protective Equipment. The Safety Officer has not identified any new hazardous areas which would require any additional uniform items for health and safety reasons. Therefore, no new equipment issuances are justified. The agency's position is there is no duty to bargain.

The agency has cited Article 28, section c. and section d. of the Master Agreement, P.S. 1600.08 Occupational Safety and Environmental Health, dated August 16, 19999, Chapter 1, Page 25, paragraph 6., 96 FSIP 162, P.S. 5538.04 Escorted Trips, and P.S. 5500.11 Correctional Services Manual in its memos dated March 22, March 24, and March 27, 2006. In addition, FMCS No. 05-53066-7 between AFGE Local 801 and FBPOP, FCI Waseca (Safety Shoe Grievance) dated March 20, 2006 is being referenced.

If you have any further questions, feel free to contact me.

[Union Exhibit No. 1].

5. In November of 2005, the parties arbitrated a grievance where the Union alleged that management violated 5 U.S.C., Sec. 7116 (a) (5) and Articles 3(c), 7(b), 6(b) and 28(g) of the Master Agreement when management changed the past practice of issuing safety footwear to all uniform staff and instead limited the issuance of safety footwear to staff that work in designated foot hazard areas. As a remedy, the Union requested that management be ordered to provide safety shoes to all uniform staff. Arbitrator David F. Paull in *AFGE, Local #801 & Federal Bureau of Prisons FCI Waseca* (March 20,

2006, FMCS Case # 050204-53066-7) determined that any award providing for footwear staff not assigned to foot hazard areas would be contrary to law as it would not be in compliance with Institution Supplement WAS-1600.5c, which designated certain areas as foot hazard areas and did not provide any exceptions for other staff to receive the footwear. The grievance was denied. [Agency Exhibit No. 6].

6. The basic contentions of the Union are:

a. The case is arbitrable because the Union "filed" by Fax and US Post the grievance on May 5, 2006. The offense occurred on March 29, 2006 when Associate Warden Dubb finally informed the Union he was no longer willing to bargain on the personnel protective equipment issues since there was "no duty to bargain". Therefore, the grievance was in fact "filed" under Article 31, Section d of the Master Agreement within 40 days of the date of the alleged grievable occurrence since there are 38 days between March 29 and May 5, 2006-counting both March 29 and May 5.

b. The agency violated the Master Agreement and federal law by unilaterally ending negotiations regarding personnel protection equipment. The Union contends there is an obligation on the part of the agency to negotiate in good faith unless it can clearly state and define reasons for its refusal to negotiate. [Post-Hearing Brief of Union at 3]. The Union asks that the arbitrator "rule in favor of the Union" and require the parties "to return to the table" to negotiate the personal protective equipment in question. [Id. at 4]. "Management has not shown any reason why the safety equipment at issue is outside the duty to bargain, no government-wide rule or regulation, no contact provision which has covered the issue of stab-resistant vests (no standard existed for stab-resistant vests when the contract was signed), or protective footwear for use of force activities. The issue is not whether stab-resistant vests are appropriate for a correctional setting or how staff are to receive the required footwear for forced cell moves. The issue is not the impact on the agency budget or the impact staff wearing protective equipment will have on the mood of the institution. The issue is whether the Union has the right to negotiate protective equipment and if management has a duty to bargain." [Id.]

7. The Federal Bureau of Prisons contends that the grievance was "untimely filed". [Post-Hearing Brief of Agency at 1] because it did not receive the "Formal Grievance Form" in the US mail until May 8, 2006 –41 days after March 29, 2006. The Agency further contends that if there was a "grievable occurrence" per Article 31, Section d, it actually occurred on March 20, 2006 when Mr. Dubbs first informed the Union the Agency had no duty to bargain. [Post-Hearing Brief of Agency at 10-11, citing Tx. pp 351-52]. The Agency contends it did not have any evidence that it, in fact, received the Fax. The agency also contends that the Master Agreement does not allow an exemption for the 40-day limitation period for alleged continuing violations. [Post-Hearing Brief of Federal Bureau of Prisons at 11]. Thus, the agency contends, it did not receive the grievance until May 8, 2006, more than 40 days after the negotiations began on March 20, 2009. [Id.]

Substantively, the agency contends it did not violate the Federal Statute or the Master Agreement because 5 U.S.C. § 7106(a)(1) states that nothing in the statute shall affect the authority of any management official or any agency "to determine the mission, budget, organization, number of employees and internal security practices of the agency". [Post-Hearing Brief of Federal Bureau of Prisons at 5]. The Federal Bureau of Prisons contends that the internal security practices under the statute include the right to determine the policies and practices that are necessary to safeguard its operations, personnel and physical property against internal and external risks. This encompasses an agency's decisions that employees use or not use certain types of protective equipment. [Id. at 6]. The Federal Bureau of Prisons argues that a proposal requiring management to furnish certain items of clothing and footwear be worn with the uniform is outside its duty to bargain because it is inconsistent with law. [Id. at 6, citing *AFGE Counsel 214 and DOD, Department of the Air Force*, 30 FLRA 1025 (1988)]. The Federal Bureau of Prisons also contends that the Union's proposals requiring the agency to furnish protective vests, safety glasses and safety footwear for all staff is inconsistent with Article 28 of the Master Agreement. Article 28, Section b, states that "the employer will ensure that adequate supplies of security and safety equipment are available". [Joint Exhibit No. 1]. Article 28, Section c,

states that "the employer will provide additional equipment or clothing for safety and health reasons when necessary . . . as described by the safety officer". [Id.] Larry Gannon, Safety Manager at Waseca Prison, testified that pursuant to Article 27 of the Master Agreement, he has been given oversight of the Safety and Health Programs at the institution. Mr. Gannon explained that Article 27 gives him the responsibility to run these programs; while giving the Union the right to have input on Mr. Gannon's decisions relative to the programs. Therefore, according to Mr. Gannon, it is the right of the manager, in this case, Mr. Gannon, to determine the needs of the Safety and Health Programs; and the Union can then have input into implementing those needs after a determination by management is made. [Id. at 6-7]. The Federal Bureau of Prisons contends that it is clear from the Master Agreement that the Agency/employer/management is responsible for identifying when there is a need for additional supplies and/or equipment. Only upon management's decision to provide additional equipment does the Union have a right to negotiate the impact and implementation of that decision. Here, management did not elect or decide to issue additional safety equipment so it had no duty to bargain the Union's proposals that additional equipment be provided. [Id. at 7]. Therefore the Federal Bureau of Prisons contends that while 5 U.S.C. § 7103 defines Collective Bargaining as a mutual obligation to meet and consult in good faith, it does not compel the parties to reach an agreement. The Union cannot dispute that the parties engaged in negotiations for approximately eight days before Management ended the negotiations. [Id. at 7]. Further, the Federal Bureau of Prisons contends that it did not retaliate against the Union by removing the Oakley brand eyewear from the firearms instructors. After the Union's inquiry, Management reviewed the eyewear standards and determined that the OSHA standard did not require the specific Oakley brand to be purchased. Management attempted to address the Union's concern by ordering the firearms instructors to place the Oakley's into a general-issue bucket so that all staff would have the opportunity to use them. [Id. at 9]. Finally, the Federal Bureau of Prisons argues that the remedy requested by the Union is contrary to law. Citing Arbitrator Paull arbitration's decision where

he concluded that an award to enforce the Union's request that the agency provide safety footwear to all staff would be legally deficient as it would be contrary to a government regulation. [Id. at 10].

DECISION AND RATIONALE

A. Arbitratability/Timely Filing.

The Agency argues in its Post-Hearing Brief "the Union cannot dispute that the parties engaged in negotiations for approximately eight days before Management ended the negotiations". [Post-Hearing Brief of Federal Bureau of Prisons at 7]. It was on March 29, 2006, when Associate Warden Dwayne R. Dubbs informed the Union in writing that it was not willing any further to talk about Institution Supplement WAS-1600.5C Personnel Protective Equipment because there was "no duty to bargain". Did the Union understand that its concerns over personal safety equipment were not going to be accepted on March 20, 2006 when associate Warden Dubbs first informed the Union he had no duty to bargain? There were negotiations on those issues until March 29 when Mr. Dubbs sent a written memorandum to the Union saying clearly that the Agency was not going to further discuss this issue. As a consequence, on May 5, 2006, the Union faxed and posted by U.S. Mail [Return Receipt confirmed] a "Formal Grievance Form". [Union Exhibit No. 3]. Counting from March 29 to May 5 [including both beginning and ending date] is 38 days. The agency did not receive - according to the testimony of the Agency witnesses - the "Formal Grievance Form" until May 8, 2006. The Agency contested in the Arbitration Hearing that it did not have any evidence of receiving the Fax. Article 31, Section d, of the Master Agreement states "grievances must be **filed** within 40 calendar days of the date of the alleged grievable offense" [emphasis added]. "Filed" is not defined. Neither the Federal Bureau of Prisons nor the Union have defined the particular "filing" medium such as post, fax, e-mail or telegram. It is reasonable, therefore, to assume that "filed" may be excised through any reasonable medium. It can be reasonably be argued that "filing" can be effective when dispatched or received. Here it was both posted

and faxed, but the Fax was not received by the Agency according to its witnesses. The risk that the communication of the grievance through a reasonable medium would be lost or delayed on its journey must be allocated to one of the parties. Since "filed" is not defined in the contract, it is reasonable that once the formal grievance form is posted/dispatched by U.S. Mail (and in this case also faxed), the "filing" has taken place. Evidence produced by the Union at the Arbitration Hearing shows that the "Formal Grievance Form" was Posted [and Faxed] on May 5, 2006.

It reasonable where "filing" is not defined in the Master Agreement to interpret the Master Agreement to mean that "filing" occurs when the grievance is "dispatched". In law this is know as the "Dispatch/Mailbox Rule". [See, John Edward Murray, **Murray on Contracts 3rd Edition** at 146 **(**The Mitchie Company, 1990)]. Of course, the parties may negotiate a specific definition of "filed" and insist that the grievance be communicated in a specific manner or through a particular medium. But they did not do so in this Master Agreement. Therefore they left it to the interpretation of the Arbitrator to determine the meaning of "filed" per Article 31, Section d of the Master Agreement.

It is held that the matter is arbitrable because the grievance was "filed/dispatched" (i.e. May 5, 2006) within 40 days of the date of the alleged grievable occurrence (i.e., March 29, 2006) when Associate Warden Dubbs, in writing, "ended the negotiations". [Post-Hearing Brief of Federal Bureau of Prisons at 7.]. Further, it is held as a fact, that the "Formal Grievance Form" was faxed to the Agency on May 5, 2006.

Therefore, the grievance was "filed" in a timely manner per Article 31, Section d within forty (40) days of the grievable occurrence, that is March 29, 2006, the time the Union clearly understood that the Agency "ended the negotiations" on the personal protective equipment issue. Until that date the Union had hoped to convince the Agency, despite the Agency's "no duty to bargain" stance. The Agency did continue to negotiate the issue after March 20, regardless of the Agency's initial stance on the matter in its March 20 memorandum. But on March 29, 2006 it was made perfectly clear by the Agency to the Union that it was "ending the negotiations" on the matter. Only then was there a

"grievable occurrence" per Article 31, Section d of the Master Contract. Since March 29 to May 5, 2006 is 38 days, including both the beginning and ending dates, then the 40 day requirement was satisfied.

B. Was the break-off of negotiations by the Federal Bureau of Prisons over Personal Protective Equipment a violation of a Federal Statute or of the Master Agreement?

The Union contends that "[m]anagement has not shown any reason why the safety equipment at issue is outside the duty to bargain, no government-wide rule or regulation, no contract provision which has covered the issue of stab-resistant vests (no standard existed for stab-resistant vests when the contract was signed), or protective footwear for use of forced activities". [Post-Hearing Brief of Federal Bureau of Prisons at 4]. Basically, the Union simply asks the arbitrator to "rule in favor of the Union and require the parties to return to the table to negotiate the personal protective equipment in question". The Union contends that it "has a right to negotiate protective equipment" and "Management has a duty to bargain". [Id.]

The Federal Bureau of Prisons answers by saying "this grievance is simply a second attempt by the Union to receive a remedy that has already been denied in binding arbitration. Arbitrator David Paull previously ruled that a proposal requiring Management to provide safety equipment (in that case, footwear) beyond the limits set forth in the Institution Supplement is contrary to law". [Post-Hearing Brief of Federal Bureau of Prisons at 5]. The Federal Bureau of Prisons further contends that "although the Union has now expanded their proposal to include eyewear and safety vests, such proposals are still contrary to law and directly impact Management's exclusive rights under 5 U.S.C. § 7106 to determine matters of budget and security". [Id.].

The Federal Bureau of Prisons contends that the Union's proposal would require the agency to furnish protective vests, safety glasses and safety footwear for all staff; and that is inconsistent with Article 28 of the Master Agreement. Article 28, Section b, states that "the employer will ensure that adequate supplies of security and safety equipment are available". Article 28, § C, states that "the employer will provide additional equipment or clothing for safety and health reasons when necessary . . .

as prescribed by the safety officer". Larry Gannon, the Safety Manager, testified that pursuant to Article 27 of the Master Agreement, he has been given oversight for the Safety and Health Programs at the institution. Mr. Gannon explained that Article 27 gives him the responsibility to run those programs; while giving the Union the right to have input on Mr. Gannon's decisions relative to the programs.

It is held that based on Article 27 and 28 of the Master Agreement and 5 U.S.C. § 7106, it is the right of the Federal Bureau of Prisons through its Safety Manager, in this case, Mr. Gannon, to determine the needs of the Safety and Health Program. The Union can have input into implementing those needs after a determination by Management is made. It is clear from the Master Agreement that the employer is responsible for identifying when there is a need for additional supplies and/or equipment. Only upon the employer's decision to provide additional equipment does the Union have a right to negotiate the impact and implementation of that decision. Here Management did not elect or decide to issue additional safety equipment so it had no duty to bargain over the Union's proposals that additional equipment be provided.

The Federal Bureau of Prisons negotiated in good faith. It did not violate Article 7 of the Master Agreement by unilaterally ending negotiations on March 29, 2006. The parties engaged in negotiations for approximately eight days before Management ended the negotiations on March 29, 2006 when Associate Warden Dubbs sent a Memorandum to Christopher Campbell, the Chief Negotiator and Executive Vice President of the Union saying he was "ending the negotiations" on the personal protective equipment. [Union Exhibit No. 1]. During the negotiations, the Federal Bureau of Prisons engaged in good faith bargaining by considering Union proposals and issuing counter-proposals—even though the Agency did not have a duty to bargain over such issues. But, finally, the agency exercised its management rights and ultimately decided it did not, in fact, have a duty to bargain for the personal protective equipment requested by the Union. Management does not violate the statute or the contract simply because the parties had engaged in good faith negotiations regarding the policy and the proposals over which it has no duty to bargain. [See *U.S. Air Force Lowry Air Force Base and Local 1197*, 22

FLRA 171 (1986)]. It is not bad faith for management to declare an end to the negotiations before an agreement on additional proposals is reached by declaring it has no duty to bargain over such proposals. The fact that the Agency did, in fact, negotiate for awhile does not mean it must continue to negotiate on matters which the Agency has no duty to bargain over. The Agency has a right to break off negotiations at any time when it is or has been discussing an issue upon which there is no duty to bargain.

In this case, Management did not retaliate against the Union after the Union pointed out that the firearms instructors were provided Oakley brand eyewear. Management decided that after reflection and review Oakley eyewear is not required under the OSHA standard. Since the Union had pointed out that it appeared the firearms instructors were being given an advantage by having the Oakley brand eyewear, Management attempted to address the Union's concern by ordering the firearms instructors to place the Oakley's into the general-issue basket so that all staff would have an opportunity to use them. Management had no intent to retaliate against the firearms instructors, but rather, to provide equal treatment to its entire staff.

Based on the above analysis, it is held that:

A. The grievance was filed in a timely fashion; and

B. The request that the arbitrator rule in favor of the Union and require the parties to return to the table to further negotiate the personal protective equipment is denied.

The grievance is denied.

Dated: November 26, 2007.

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Joseph L. Daly
Arbitrator